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In the Supreme Court of the United States

OCTOBER TERM, 1925

NOS. 120, 790

EPHRAIM LEDERER, FORMERLY COLLECTOR, ETC.

v.

MARY A. MCGARVEY, EXECUTRIX, ETC.

THE UNITED STATES

v.

JOHN E. ZERBEY AND NATIONAL SURETY COMPANY, a Corporation of the State of New York

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ON CERTIFICATES FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION TO ADVANCE NO. 790 FOR ARGUMENT WITH NO. 120 AND TO HAVE BOTH CASES SET FOR HEARING ON A DAY CERTAIN

Comes now the Solicitor General and moves to advance case No. 790, *The United States* v. *John E. Zerbey and National Surety Company*, for oral argument with case No. 120, *Lederer, Formerly Collector*, v. *McGarvey, Executrix of O'Kane*, and to set both cases for hearing on Monday, March 1st next, or as soon thereafter as convenient to

the Court. This motion is based upon the following grounds:

Both cases are in this Court on certificate from the Circuit Court of Appeals for the Third Circuit and present precisely the same questions, namely, whether a permit bond on Form 738, executed under the National Prohibition Act and regulations made pursuant thereto, is a forfeiture bond so as to enable the United States to recover the full amount named in the bond in the event of a breach of its condition, or is a mere indemnity bond restricting recovery to the actual damages shown by the United States to have resulted to it from such breach.

In the *Lederer case* the action was begun in the District Court of the United States for the Eastern District of Pennsylvania by Francis O'Kane to recover from Ephraim Lederer, former Collector of Internal Revenue, certain revenue taxes and a penalty alleged to have been unlawfully assessed against the plaintiff by the defendant, acting as such Collector, and paid by the plaintiff under protest. Defending the action Lederer filed an affidavit of defense and counterclaim in which he conceded that all but a small part of the sum sued for by O'Kane had been unlawfully assessed, but nevertheless opposed any recovery on the ground that O'Kane had breached the condition of a permit bond executed by him on Form 738 and was accordingly indebted to the United States

in the full penal sum of the bond, which exceeded the amount of O'Kane's claim. A demurrer to this pleading was sustained by the District Court on the ground that the bond in question was a mere indemnity bond, for breach of which the United States could recover only such damages as it should show had been suffered by it in consequence of said breach, and as the affidavit of defense failed to allege any damage resulting from the breach it did not set up any valid counterclaim or defense to the action. Lederer elected to stand on his pleading, and as O'Kane did not press his claim for the small amount which Lederer insisted had been properly assessed, the District Court gave judgment for the plaintiff for the amount conceded by the defendant to have been illegally assessed. Upon writ of error sued out by Lederer the Circuit Court of Appeals certified to this Court the following questions:

> 1. Is a bond conditioned upon compliance with the law of the United States and regulations issued pursuant thereto, respecting the sale or use of distilled spirits and wines for other than beverage purposes, given the United States by one to whom a permit to sell intoxicating liquors for other than beverage purpose has been issued under the provisions of Section 6 of Title II of the National Prohibition Act and regulations promulgated thereunder, forfeitable upon breach of the condition in the full amount of its penal sum?

2. Is recovery upon breach of the condition of such a bond given by one holding such a permit limited to actual damages sustained by the United States?

In the *Zerbey* case the United States filed its statement of claim in the District Court of the United States for the Middle District of Pennsylvania for the recovery from Zerbey and the National Surety Company, his surety, of the full amount named in a Form 738 permit bond executed by Zerbey and the condition of which it was alleged he had breached. The District Court sustained a demurrer to the statement of claim, holding that the bond was not a forfeiture bond but a mere indemnity bond, and that, as under the pleadings no pecuniary loss or damage was alleged to have been suffered by reason of the alleged breach, the action could not be maintained. The statement of claim was accordingly dismissed, and the United States took the case on writ of error to the Circuit Court of Appeals, which has certified to this court questions identical with those certified in the *Lederer case*.

In view of the decision of this Court in *Sage* v. *United States*, 250 U. S. 33, it is doubtful that Lederer had the right, in the action brought against him by O'Kane, to set up as a counterclaim an obligation alleged to be due and owing to the United States. Apprehending that this Court might regard the bond questions as not involved in the *Lederer case*, and therefore decline

to answer the questions certified therein, the Government pressed action in the lower courts in the *Zerbey case*, wherein the same questions were unmistakably involved, in order that if the certificate in the *Lederer case* should be dismissed a decision by this Court of these questions might not be unduly delayed.

An early decision by this Court of these bond questions is of very great importance to the Government in its administration of the prohibition and revenue laws. Court proceedings in many similar cases are being held in abeyance pending such decision, which will also determine the rights of the Government in bonds, bearing like conditions, aggregating potential liabilities of many millions of dollars.

Because of the apparent defect in the *Lederer case* certificate the Government will be content to present its argument to this Court in that case by brief only. As, however, the many thousands of these Form 738 bonds, as well as of other bonds having similar conditions, which are outstanding, will be valueless unless the Government can sustain its contention that they are penal bonds as distinguished from mere indemnity bonds, because it can not show that the United States suffers any pecuniary loss from their breach, the questions certified are regarded by the Government as of such gravity as to require oral argument in the *Zerbey case* for the full time allowed by the rules

in cases in which questions have been certified to this court.

Notice of this motion has been served on opposing counsel.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

MABEL W. WILLEBRANDT,
Assistant Attorney General.

OCTOBER, 1925.

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